

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MICHAEL O'BRIEN,

CV. 09-1148-JE

Plaintiff,

FINDINGS AND RECOMMENDATION

v.

J.E. THOMAS, WOMELDORF, BURNS,  
LANE, and McMANN,

Defendants.

JELDERKS, Magistrate Judge.

Plaintiff, an inmate formerly housed at FCI-Sheridan, brings this civil rights action pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). He principally alleges that defendant Burns subjected him to an unconstitutional group strip search on April 15, 2008. Pending before the court is defendants' Motion to Dismiss [21] filed pursuant to Fed. R. Civ. P. 12(b)(6).

As an initial matter, when plaintiff failed to respond to defendants' Motion to Dismiss, the court issued an Order requiring

him to show cause why his case should not be dismissed. That Order was returned to the court for lack of a current address on February 15, 2011. As a result, plaintiff has been without a current address for more than 60 days, and his case is therefore subject to dismissal under Local Rule 83-12.

In addition, in *Hoover v. Thomas, et al.*, CV. 09-1147-JE, the court issued a Findings and Recommendation in which it determined that the strip search at issue in this case comported with constitutional requirements, as did the conduct of defendants which occurred in the wake of the search. While this particular plaintiff also asserts that defendants Burns and Lane made an inappropriate anatomical remark about him, verbal abuse by a prison official does not amount to a constitutional violation. *Oltarzerski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987); see also *Austin v. Terhune*, 367 F.3d 1167, 1171-72 (9th Cir. 2004) (verbal sexual harassment is not protected by the Eighth Amendment). As a result, and for the reasons stated in the *Hoover* Findings and Recommendation, the court recommends that defendants' Motion to Dismiss [21] in this case be GRANTED, and that plaintiff's Complaint [2] be DISMISSED with prejudice. The Clerk of Court is DIRECTED to attach a copy of the *Hoover* Findings and Recommendation to the Findings and Recommendation in this case.

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**SCHEDULING ORDER**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections. Failure to timely file objections to any factual determination(s) of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issue(s), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 26th day of April, 2011.

/s/ John Jelderks  
John Jelderks  
United States Magistrate Judge